In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1340

HERMAN GORDON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING AND TO REMAND

LAWRENCE E. HOFFMAN
Attorney for Petitioner
Suite 12-D, 407 Lincoln Road
Miami Beach, Florida

HOFFMAN & ST. JEAN
Of Counsel

MIAMI REVIEW — 371-4853 — 377-5721

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HERMAN GORDON, Petitioner herein, by and through his undersigned attorney, files this, his Motion for Leave to File Petition for Rehearing and to Remand, and, as grounds therefor, would show unto this Honorable Court as follows:

1. This Court did, on May 25, 1970, enter an Order denying the Petition of Petitioner herein for a Writ of Certiorari. Pursuant to Rule 58 of the Rules of the Supreme Court of the United States, a Petition for Rehearing is required to be filed with this Court within twenty five (25) days after the above-described Order is entered, namely: on June 19, 1970.

2. On June 18, 1970, the printer for Petitioner did send to this Court, by Air Mail and Certified Mail, the requisite number of printed copies of a Petition for Rehearing and to Remand, with the expectation that the same would be received by this Court on the following day, June 19, 1970, as has taken place in the past. For reasons unknown to petitioner or to his printer, the said Petitions for Rehearing and to Remand were not received by the Clerk of this Court until Monday, June 22, 1970.

3. Attached hereto is the Petition for Rehearing and to Remand, which sets forth the reasons why such petition should be granted, and Petitioner submits that the delay in the mails of several days should not cause a forfeiture of his right to have this Court consider his Petition for Rehearing and to Remand.

IT IS HEREBY CERTIFIED that this Motion for Leave to File Petition for Rehearing and the Petition for Rehearing and to Remand is presented in good faith and not for delay.

Respectfully submitted,

LAWRENCE E. HOFFMAN
Attorney for Petitioner
Suite 12-D, 407 Lincoln Road
Miami Beach, Florida

Lawrence E. Hoffman

HOFFMAN & ST. JEAN
Of Counsel

IT IS FURTHER CERTIFIED that true and correct copies of the within Motion for Leave to File Petition for Rehearing and to Remand were mailed, this 26th day of June, 1970, to the following:

ERWIN N. GRISWOLD, Solicitor General;

WILL WILSON, Assistant Attorney General;

BEATRICE ROSENBERG, Attorney;

EDWARD FENIG, Attorney.

Department of Justice
Washington D. C.

Lawrence E. Hoffman

LAWRENCE E. HOFFMAN

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PETITION FOR REHEARING AND TO REMAND

HERMAN GORDON, Petitioner herein, by and through his undersigned attorney, files this, his Petition for Rehearing and to Remand, pursuant to Rule 58 of the Rules of the Supreme Court of the United States, and prays this Honorable Court to grant a rehearing of the denial by this Court of a Petition for a Writ of Certiorari, which Order of denial is dated May 25, 1970. Petitioner had filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the Opinion and Judgment of that Court dated January 26, 1970, and the Order of the same Court, dated February 18, 1970, denying a Petition for Rehearing.

The questions presented in said Petition for a Writ of Certiorari were as follows:

I.

WHERE A SEARCH WARRANT AUTHORIZES SEARCH FOR, AND SEIZURE OF, 187 PIECES OF JEWELRY, EACH PIECE MARKED WITH "18K" OR "22K", PLUS TRADEMARK "Z" OR "ZOLOTAS", IS ITS EXECUTION LEGAL WHEN FIVE F.B.I. AGENTS SEARCH A 2-BEDROOM APARTMENT FOR APPROXIMATELY 7 HOURS INITIALLY, AND SEIZE TWO CUPS WHICH CONTAIN NO MARKINGS, AND ALSO SEIZE THOUSANDS OF OTHER ITEMS NOT IN PLAIN VIEW AS CONTAINED IN A 108-PAGE INVENTORY CONSISTING OF JEWELRY, COINS, WATCHES, WATCH MOVEMENTS, SEMI-PRECIOUS AND PRECIOUS STONES, NOT DESCRIBED IN THE WARRANT BUT WHICH THEY CONTEND TO BE CONTRABAND BECAUSE IT MIGHT POSSIBLY BE STOLEN MERCHANDISE ALTHOUGH THEY DO NOT HAVE ANY KNOWLEDGE AS TO WHEN OR WHERE IT MIGHT HAVE BEEN STOLEN OR TRANSPORTED IN INTERSTATE COMMERCE, AND WHEN A TOTAL OF EIGHT F.B.I. AGENTS CONTINUE THE SEARCH FOR AN ADDITIONAL FOUR HOURS AND MAKE A RETURN AND INVENTORY ON THE SEARCH WARRANT MERELY FOR TWO CUPS?

II.

ON A CHARGE OF POSSESSION OF WATCH MOVEMENTS ON MARCH 18, 1968, WHICH WERE PART OF A SHIPMENT STOLEN FROM O'HARE INTERNATIONAL AIRPORT, CHICAGO, ILLINOIS, ON AUGUST 20, 1966, WHILE MOVING IN FOREIGN COMMERCE, IN VIOLATION OF TITLE 18, U.S.C. §659, DOES THE GOVERNMENT PRESENT A PRIMA FACIE CASE WHEN THERE IS NO DIRECT EVIDENCE THAT DEFENDANT KNEW THE MOVEMENTS WERE STOLEN, AND WHEN THE THEFT TOOK PLACE SOME ONE YEAR AND SEVEN MONTHS PRIOR TO THE POSSESSION?

III.

WHERE AN APPELLATE COURT REVERSES A COUNT OF AN INDICTMENT ON WHICH THERE WAS A CONCURRENT SENTENCE, DOES THE CONCURRENT SENTENCE DOCTRINE HAVE CONTINUING VALIDITY?

IV.

IS IT IRRATIONAL OR ARBITRARY AND, HENCE, UNCONSTITUTIONAL FOR A TRIAL COURT TO INSTRUCT A JURY THAT MERE POSSESSION OF PROPERTY RECENTLY STOLEN IS A CIRCUMSTANCE

FROM WHICH A JURY MAY REASONABLY DRAW THE INFERENCE AND FIND THAT THE PERSONS IN POSSESSION KNEW THE PROPERTY HAD BEEN STOLEN AND THAT THE GOVERNMENT NEED NOT ESTABLISH THAT THE ACCUSED ACTUALLY KNEW THAT THE PROPERTY WAS A PART OF INTERSTATE COMMERCE?

As grounds therefor, Petitioner represents unto the Court the following intervening circumstances of substantial effect, and other substantial grounds not previously presented:

1. In his Petition for a Writ of Certiorari, Petitioner argued that the Search Warrant issued for the curtilage of Petitioner authorized the search for, and seizure of, cups and other "Greek jewelry", all of which were particularly described as containing the marks, "18 K" or "22 K" and "Z" or "Zolotas". The basis for the issuance of the search warrant was an Affidavit by a law-enforcement officer that he observed two (2) cups in Petitioner's apartment which resembled photographs he had seen of the stolen cups which were included in a package of "Greek jewelry". As soon as the agents executed the Search Warrant, the two (2) cups in question were seized, examined in detail, and were found not to contain the markings recited in the Search Warrant.

The Brief of the United States in Opposition represented that the two cups seized by the agents were, in fact, part of the stolen shipment of Greek jewelry, and, therefore, the agents were authorized to continue the search

for the remaining items of Greek jewelry. Accordingly, there is substance in Petitioner's argument that the agents made an unlawful seizure of items not particularly described in the Search Warrant.

2. A substantial question presented in the Petition for Writ of Certiorari revolved about the seizure by law-enforcement officers of the items contained in a 108-page Inventory by virtue of the aforedescribed Search Warrant. About seven (7) hours after the execution of the Search Warrant, which particularly described the cups and the jewelry, the agents served and executed a second Search Warrant, which contained a description of all items in the apartment which they observed while executing the original Search Warrant.

The trial court found that the entire 108-page Inventory of items had been seized about three (3) hours after the agents first entered Petitioner's apartment, and prior to the issuance of the second warrant. The Brief of the Government rejected this finding of fact, and argued that during the course of the search, the agents came upon a locked closet in which they observed suitcases, and, after a cursory examination, returned the key to said closet to Petitioner while one of the agents left to get a second warrant.

As a matter of truth and fact in the Record herein, and as determined by the trial court, the key to the locked closet remained in the possession of the search party, and was never returned to Petitioner. Accordingly, the seizure of all items was completed before the issuance of the second warrant, although the Inventory and Return on the first warrant listed only the two cups.

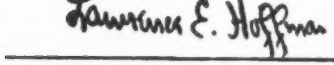
3. The Brief for the United States in Opposition to the Petition for Writ of Certiorari revealed, for the very first time, that during the years 1963 and 1964, the Petitioner visited two locations where electronic surveillance of others was being conducted, and the voice of Petitioner was overheard on at least two occasions. This novel revelation also recites that the logs contain some discernible references and advice, in criminal argot, as to means of accomplishing criminal enterprises then currently contemplated.

If the seizure of Petitioner's property was, in fact, accomplished pursuant to the first Search Warrant, it was illegal. If this Court accepted the argument of the Government that seizure was made pursuant to the second Warrant, then Petitioner points out that the Affidavit and basis for the issuance of the second Warrant was information and advice obtained by the Government from the electronic surveillance above-described. As argued in the Government Brief, the agents uncovered other items of jewelry in the house of a "known associate of jewel thieves", which said information was obtained by means of the overheard conversations.

In accordance with *Alderman v. United States*, 394 U.S. 164, the within-entitled cause should be remanded to the District Court for a hearing to determine whether or not the intercepted conversations were illegal, and, if so, whether the conviction was tainted thereby. The fact that the electronic surveillance occurred some four (4) or five (5) years prior to the arrest of Petitioner does not obviate the use by the Government of the information so obtained to secure the issuance of a Search Warrant based thereon.

Respectfully submitted,

LAWRENCE E. HOFFMAN
Attorney for Petitioner
Suite 12-D, 407 Lincoln Road
Miami Beach, Florida



HOFFMAN & ST. JEAN
Of Counsel

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that true and correct copies of the within Petition for Rehearing and to Remand were mailed this 18th day of June, 1970, to the following:

ERWIN N. GRISWOLD, Solicitor General,

WILL WILSON, Assistant Attorney General,

BEATRICE ROSENBERG, Attorney,

EDWARD FENIG, Attorney,

Department of Justice
Washington, D. C. 20530

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